to be found in the suggestion of the Wisconsin court, *Gowran* v. *Lennon*, 154 Wis. 566, that the attorney should be allowed to go on with the suit, after the client's attempted compromise, only when the client is unable at that time to settle the attorney's claim for fees. Undoubtedly, there are some cases in which public policy so strongly demands an absolute right on the part of the client to settle regardless of his attorney's wishes, that nothing can be permitted to stand in the way. Such, for instance, are cases involving marital differences, etc. In such cases the contract for contingent fees might be deemed valid if it were to be considered as carrying an implied condition subsequent to the effect that the client can settle with his opponent at any time and thus discharge the contingent fee contract with the attorney.

D. H. B.

CONTINUING TRESPASS AND REPEATED WRONG.—The case of *Amstutz* v. *King et al.*, recently decided in the supreme court of Ohio, shows the difficulties under which the courts are laboring in their efforts to get away from the conclusions of the "strong" decisions on the question of law indicated in the title. This case has been reported without opinion, and therefore will not be published in the Ohio State Reports until the bound volume is put out. It is understood that it is to appear in Volume 102, Ohio State Reports. The notation of the court is as follows: "This case is affirmed on the authority of *Gillette* v. *Tucker*, 67 Ohio St. 106 (1902), and *Bowers* v. *Santee*, 99 Ohio St. 361 (1919)." The facts in the case were apparently undisputed in the lower court. The petition of the plaintiff alleged that she employed Dr. King and Dr. Shuffield to perform an abdominal operation on her, on March 9, 1916. *All relationship between these physicians and the patient ceased soon after the operation.* On September 3, 1917, a gauze sponge passed from her body, having been left in the abdomen at the time of the operation. The petition was filed April 30, 1918. By the law of Ohio, "Action for malpractice * * * shall be brought within one year after the cause of action thereof accrued." G. C. 11225. The petition was demurred to on the ground that the statute of limitations had run. The lower court sustained the demurrer and judgment was rendered against the plaintiff. The supreme court has recently affirmed the judgment of the lower court, four members of the court concurring and three judges dissenting.

As the case is reported without opinion, we are thrown back upon the two cases cited as precedents to determine the theory of the decision. The case of *Gillette* v. *Tucker* (1902), 67 Ohio St. 106, is identical in its physical facts with the instant case. In each case the surgeon in charge left a sponge in the wound when the incision was closed. The important juridical fact which differentiates the cases is found in the words italicized above; namely, that in the last case the professional relations between the plaintiff and defendant ceased soon after the time of the operation, while in the earlier case such a relation continued up to a point of time within the year before suit was brought. The case of *Gillette* v. *Tucker* was originally decided by an evenly divided court, thus affirming the decision of the circuit court. This decision was in favor of Mrs. Tucker, the patient, who claimed to have been

injured by the negligent treatment of the surgeon. The decision in *Gillette* v. *Tucker* was later reversed in the case of *McArthur* v. *Bowers*, 72 Ohio St. 656 (1905). No opinion is given in this last case. The notation is simply, "Judgment reversed and that of the common pleas affirmed on the doctrine of the dissenting opinion in *Gillette* v. *Tucker*." Finally, in the case of *Bowers* v. *Santee*, 99 Ohio St. 361 (1919), the court said: "We * * * most respectfully disagree with and disapprove the *McArthur* case and we approve and reaffirm the doctrine announced in the *Gillette* case." The doctrine thus finally adopted by the Ohio court is that expressed in the opinion of Mr. Justice Price, at page 133 of the report, which therefore demands a more careful consideration. Price, J., bases his argument on the case of *Perry County* v. *Railroad Co.*, 43 Ohio St. 451 (1885). In this case the injury complained of was one to property, the destruction of a bridge. The court here said: "From the time the injuries complained of were committed * * * the duty of defendant to restore the bridge to its former usefulness and safety was a continuous and subsisting obligation, and each day's failure to make full restoration was a fresh breach of such obligation; and lapse of time cannot avail to interpose a bar to recovery." It has been before argued at considerable length in this REVIEW (Cf. 19 MICH. L. REV. 380) that the theory of the *Perry Co.* case, and consequently that of all the cases since decided in the Ohio court based upon it, is that of a "repeated" wrong, each repetition of which constitutes a new cause of action. If the theory of the instant case, one in which the injury is to the person, is based on the *Perry Co.* case, which is one of injury to property, it is evident that the case of *Clegg* v. *Dearden*, 12 Ad. and El. (n. s.) 575 (1848), and the long course of decisions based on this case, including the troublesome one, *The National Copper Co.* v. *The Minnesota Mining Co.*, 57 Mich. 83 (1885), cannot be used as precedents for the instant case, because the decision in the *Perry Co.* case is directly contrary to the decision of the English court in the case of *Clegg* v. *Dearden, supra,* on the same state of facts. (Cf. 19 MICH. L. REV. 378.)

The question then arises whether the Ohio court has adopted a theory of decision in this case different from that of the court in *Gillette* v. *Tucker* and *Bowers* v. *Santee*. The significant fact in the instant case which differentiates it from the two cases above cited is that in the present case the surgeon did not continue in charge of the case after the operation, with its negligent inclosing of the sponge in the wound, and therefore had no opportunity after that time to correct the negligence of *leaving* the sponge in the wound, hence the statute of limitations begins to run from the time when his last act of negligence occurred and the statutory period had elapsed before the petition was filed in the case. As this case is decided by a divided court, and as it leaves us with a verdict in favor of the defendant instead of with the plaintiff as in the two cases cited as precedents for this decision, we are still confronted with the question as to what the proper ground of decision is in such cases. In the *Gillette* case and in the *Bowers* case the court apparently assumes that a new cause of action arises each day that the foreign body is *left* in the wound. This is shown by Judge Price's use

of the *Perry Co.* case. And as suit is brought within a year after its removal the plaintiff is not barred of her recovery by the lapse of the statutory period. But in the *Amstutz* case, because the surgeon ceases to treat the patient soon after the operation, he is held responsible for the successive irritations caused by the foreign body only up to the time when by removal of the foreign body he might have prevented further irritation. As his last opportunity to correct his blunder was more than a year before suit was brought, the statute was a bar to the recovery; *i. e.,* in the *Amstutz* case the statute begins to run not from the time that the last wrong was inflicted upon the plaintiff but from the time that the surgeon had the last opportunity to correct his original blunder.

The practical result of this decision is to put a very important limitation upon the chance for recovery in the malpractice cases. This limitation is, in fact, incorporated in the decision in the *Gillette* case and in the *Bowers* case. Price, J., says in 67 Ohio St. 133: "The facts in the case at bar show a continuous obligation upon the plaintiff in error, *so long as the relation of employment continued.*" Cf. also *Fronce* v. *Nichols, 22* O. C. C. 539, 12 O. C. D. 472 (1901); *Perkins* v. *Trueblood,* 180 Cal. 437 (1919); *Miller* v. *Ryerson, 22* Ont. Rep. 369; *Calumet Elec. St. Ry. Co.* v. *Mabie,* 66 Ill. App. 235 (1896). The Ohio court then seems to be committed to the doctrine that *leaving* the sponge in the wound is a new wrong which gives rise to a new cause of action, but that the last wrong for which the surgeon can be held responsible is the one committed on the last day in which he has charge of the case and consequently has his last opportunity to remedy the wrong, and this seems the doctrine also of the courts above cited. On this point they are at variance with the Pennsylvania court, which holds that "the statute runs against an injury committed * * * from the time of the actual discovery" of the wrong. This in a case where the injury was to land. *Lewey* v. *Frick Coke Co.,* 166 Pa. St. 536, 547 (1895). The holding of the Michigan court in a malpractice case was in accord with that of the Pennsylvania court and contrary to that of the instant case on this point. *Groendal* v. *Westrate,* 171 Mich. 92 (1912). This last case was decided under a statute which said that"the action may be commenced at any time within two years after the person who is entitled to bring the same shall discover that he has such cause of action," if the defendant shall have fraudulently concealed the fact from the plaintiff. We are thus left with all the courts in accord as to the doctrine of "repeated wrong" in the malpractice cases, but at variance on the point as to whether the statute begins to run from the date of discovery of the wrong by the plaintiff or from the date of the last opportunity for the defendant to remedy the wrong. The more liberal rule of the Pennsylvania and Michigan courts would seem to be more in accordance with justice, and in close analogy to those cases in which the statute of limitations is suspended or interrupted during the time when the plaintiff cannot assert his right because of excusable ignorance of its existence or because of some legal bar to its assertion, as when property has been removed from the jurisdiction and the plaintiff is ignorant of its whereabouts. Cf. *Gatlin* v. *Vaut et al.,* 6 Ind. T. 254, 91 S. W. 38, (1906). This is

none the less true when the plaintiff is in ignorance without fault on his part than when his ignorance is caused by the fraudulent concealment of the true state of affairs by the act of the defendant, as in the Ohio and Pennsylvania cases cited above. The plaintiff should not be barred of his right unless he knows of its existence and can take legal steps to vindicate it. As the decision in the instant case is by a divided court, it might be possible that the Ohio court would change its ruling on this point if the issue were squarely presented to it. J. H. D.

LANDLORD AND TENANT—TERMINATION OF TENANCIES FROM YEAR TO YEAR CREATED BY HOLDING OVER.—The plaintiff was a tenant in possession of an office suite held under a three years' written lease at a yearly rental, payable in equal monthly installments. He held over for nearly thirteen years, paying rent regularly. Section 11812, Compiled Laws of Michigan, 1915, reads: "And in all cases of tenancy from year to year, a notice to quit, given at any time, shall be sufficient to terminate said lease at the expiration of one year from the time of the service of such notice." It was *held* (two judges dissenting), that the landlord could terminate the plaintiff's tenancy at the end of the year period, without notice. The injunction asked for was refused. *Rice* v. *Atkinson, Deacon, Elliott Co.* (1921), 215 Mich. 371.

In the majority opinion we find the following pertinent language: "While a tenant paying an annual rental who holds over after his term has expired with the acquiescence of his landlord is frequently called a tenant from year to year, I am persuaded that such tenancy does not possess all the attributes of one from year to year. * * * The question, however, is one of authorities, and to them I shall now call attention." In considering the authorities, the court first quotes from CYC.: "In some cases a distinction seems to have been made between those tenancies from year to year arising from leases for indefinite terms, and those arising from a holding over by the tenant after the expiration of a lease for a specified term. Thus, it has been held that a tenant who occupies demised premises for several years after the termination of his lease creates each year a new term expiring at the close of the current year, and requiring no notice for its determination." 24 CYC. 1381. Two cases are there cited in support of that view. *Adams* v. *City of Cohoes,* 127 N. Y. 175; *Gladwell* v. *Holcomb,* 60 Ohio St. 427. So far as the language used by the author in CYC. is concerned, it must be noted that he said no more than that "some cases" have made a distinction. The next text-writer quoted is McAdam, and it must be conceded that he supports the view taken by the majority in the principal case. MCADAM ON LANDLORD AND TENANT (Ed. 4), p. 667. Three New York cases are cited by McAdam in support of his view. *Adams* v. *City of Cohoes, supra; Park* v. *Castle,* 19 How. Pr. 29; *Rorbach* v. *Crossett,* 46 St. R. 426, [19 N. Y. Supp. 450]. The court next relies upon Taylor: "When a tenant for a year, or any other ascertained period, holds over without permission, no notice is of course necessary, since, without some fresh agreement, express or implied, the tenancy by its own terms is at an end." 2 TAYLOR ON LANDLORD AND TENANT (Ed. 9), p. 52. Analysis of that statement will certainly reveal that